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MALICE IN MORALS AND IN LAW.

Malice in morals and malice in law are essentially distinct; yet a knowledge of the nature and practical effects of the one will prove of singular service in the investigation of the other.

Malice (from Latin *malitia*, signifying wickedness, ill-will, spite,) is a special manifestation of malevolence, and is, therefore, a mental condition requiring some exciting cause for its production. It is composed of two elements; the one negative, the other positive. There is a negative of love, and there is, furthermore, present, positive ill-will, or design to compass the infliction of pain upon the displeasing object. Lord Coke, in 2 Inst. 42, very properly distinguishes between *hatred* and *malice*, in that "malice is *acida*, that is, eager, sharp, cruel." Another passion, akin to malice, is anger, which is "an uneasiness or discomposure of the mind upon the receipt of any injury, with a present purpose of revenge." Locke's Essays, b. 2, c. 20 § 12. Envy, also, is not unfrequently confounded with malice. The distinction between them will be perceived by adverting to the definition of the former: "Envy is an uneasiness of the mind, caused by the consideration of a good we desire, obtained by one we think should not have had it before us." Ibid, § 13.

Anger, envy, hatred, may, most generally do, coexist with malice, but it is always as concomitants and not as elements. Such are the results at which we arrive by introspection and observation—the only sources of psychological knowledge. They are important in morals; for the moral quality neither does nor can abide in the act. And, therefore, an eminent Jewish lawyer declares that "out of the heart are the issues of life." Yet we, from finiteness of understanding, are restricted, in our grounds of judgment, to overt actions. The fact that the common experience of mankind demonstrates an agreement between these and the prompting motive, proves them no very inaccurate standard. The term overt actions, as here used, comprehends a grouping of circumstances and relations as well as of objects to be attained. Absolute correctness is not to be expected, and little will be gained by giving to vague conceptions a "habitation and a name," without inquiring into their character and application.

When we turn from morals to law, the field of vision is changed. The attention must be directed to the outer world, to actions in their origin and results. Here a diligent collation of the authorities will afford us this comprehensive definition of malice: It is the intentional doing of a wrongful act, with knowledge of its character, and without just cause or excuse. *State* vs. *York*, 9 Metc. 104; *Wiggins* vs. *Coffin*, 3 Story 7. The use of the word "intentional" seemingly considers the mental state as still an element, but it is in seeming only, for the word has a technical meaning distinct from any reference to mind. The legal differs materially from the moral import of malice. It signifies not merely hatred or ill-will, but any wicked or mischievous intention of the mind, or inexcusable recklessness. Russell on Cr. 483, n. i. This signification was ignored by Pres. Nott, when he said, in speaking of the death of Hamilton, "There may be murder in reason and in fact where there is no malice." Many writers, literary and legal, have fallen into the same error, which has tended to increase the confused ideas entertained upon the subject.

In this discussion we desire entirely to dissociate malice in intendment of law from the mental condition, with which, properly con-

sidered, it has nothing to do, except in so far as the demonstrative acts are found, on *a posteriori* principles, to be the natural outgrowth of such mental condition. With this understanding, we will venture the following definition: Malice is the concurrence of certain circumstances, involving injury, actual or probable, to one without adequate or justifiable benefit to another. Obviously, it would be impossible to designate with greater precision, the *indicia* of malice, for these vary with the phases of each particular case or crime. There is sufficient definiteness for identification. The injury, for instance, may be ideal or physical, according as it affects character or person, or property; it may be present, or prospective; and it may be actual, or simply existent in the eye of the law. The essential elements are the injury, as above explained, and the deficiency of legal excuse, entirely excluding motive from the consideration. This is justified by the tendency of modern adjudication. Thus, in *Wiggins* vs. *Coffin*, before cited, Justice Story holds, that "an act unlawful in itself and injurious to another is considered both in law and reason, to be done with a malicious intent (*malo animo*) against the party injured." The tendency is, also, shown by the omission of the phrase "by the instigation of the devil," and others of kindred import, from modern writs and pleadings.

KINDS OF MALICE.—But malice, as thus far treated, is compound, and, in practice, must be resolved into its elements. *General* malice is a love of evil for evil's sake. It proceeds from, and evidences depravity of nature. There are sporadic exhibitions of it in all countries, and sometimes there exist whole tribes or fraternities, like the Thugs of India, actuated by such a disposition. From this, *particular* malice differs, in that it has a specific aim and object.

Another division is into *constructive* and *actual*, which are variously denominated *implied* and *express*, or malice *in law* and malice *in fact*. This distinction was first authoritatively made in the great case of *Bromage* vs. *Prosser*, 4 B. & C. 247. After a verdict for the defendant, upon a motion for a new trial, the Court of King's Bench held that the law recognized the distinction between these two descriptions of malice, to wit: malice in fact and malice in law. And that malice, in common acceptation, meant ill-will against a

person; but, in its *legal* sense, it meant a wrongful act done intentionally, without legal justification or excuse. Little improvement has been made upon this statement. Like Lord Holt's opinion in the celebrated bailment case of *Coggs* vs. *Bernard*, it has, however, been elaborated and explained. We deduce the following compact definitions from 2 Stark. Ev. 674–5: "Malice in law is a mere inference of law, which results simply from a wilful transgression of law."

Malice in fact signifies "the actual state or condition of the mind of the agent, with which he has done a particular act; as that he did it with a view to prejudice a particular individual, either generally or in some specific manner."

Again: "A malicious intention in fact is a matter of inference from all the circumstances of the particular case; but nevertheless the terms, malice and malicious, being technical terms of law, involve, as indeed all other technical terms do, the application of legal judgment and consideration to the facts as found by the jury."

It is noticeable that, although Mr. Starkie, following the popular phraseology and style of thought, refers malice in fact to the internal nature, yet he concludes by referring it simply and entirely to the concurrence of specific facts, thus harmonizing with the definition offered *supra*. See, also, *Wills* vs. *Noyes*, 12 Pick. 328.

Malice *prepense* will require a brief notice in this connection. Sir Edward Coke, in 3 Inst. 62, declares it existent, in the case of felony, "where the act was done voluntarily, and of set purpose, though done upon a sudden occasion." The element of time is thus seen to be comparatively a non-essential. This kind is not specially distinguishable from malice in fact.

Mode of Proof.—To this, adversion has already been, and will subsequently be made at some length. It constitutes, in part, the difference between the several kinds of malice. Malice in law results necessarily upon proof of the facts making up the cause of action, or from evidence of gross negligence or carelessness. Malice in fact must be directly proved by circumstances not intrinsic, though relevant. The stronger circumstances demonstrate, the more clearly an evil motive as revealed in the adaptation of means

to end. Malice is in all cases a question of fact to be determined by the jury, under proper instructions from the court. But there are cases where the jury may take it for granted, or, rather, where its existence is a matter of no moment, except as an aggravating circumstance.

MALICE AN ELEMENT OF LEGAL LIABILITY.—It is by some denied that malice is ever an essential element of legal liability. Such doctrine is hardly reconcilable with the language of the books of earlier or later date. Its domain is more circumscribed than is by many supposed; nevertheless it has a place in some actions as an integral part of the offence charged, and evidence thereof must be submitted to the jury. We shall follow the usual division of actions.

I. *Criminal actions.*—1. *Homicide.*—"Though a man put another to death; yet, according to the motive with which the act was committed, the motive being to be determined by the circumstances of the particular case; what he has done, is, in law, justifiable, or excusable, or criminal." George on Libel, 150. We are interested in only one of these kinds, to wit, felonious or criminal homicide, which is defined by Blackstone (4 Com. 188) to be "the killing of a human creature, of any age or sex, without justification or excuse." This is itself divisible into manslaughter and murder. Between these the main distinction is the presence or absence of malice; for manslaughter, though unlawful, is a killing without malice, express or implied. Chief Justice Shaw has, in *State* vs. *York*, 9 Metc. 115, explained the principle here involved: "From this view of the immemorial usage of the courts, upon special verdicts, it appears manifest that the fact of the killing is *prima facie* evidence of malice, and, unless overcome by preponderating proof the other way, it must be held murder, and judgment given accordingly." This is merely a restatement of the doctrine laid down by Blackstone in his Commentaries. We do not understand it to be essentially changed in New York by the decision of the court of Appeals in the McCann case. That decision—which seems to be contrary to all law, whatever may be its foundation in common sense—enforces the *onus probandi* upon the prosecution to an unheard of extent. The question of malice must, however, remain

as heretofore. If the defence disprove the presumption, positive proof of express malice must be adduced by the prosecution. This consists of "external circumstances discovering the inward intention; as laying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm." 4 Bl. Com. 199.

2. *Mayhem.*—This, in order to be felony, must be done with malice prepense. The same principles apply to it as to murder.

3. *Arson.*—This is the malicious and wilful burning the house or outhouse of another man. 4 Bl. Com. 219. It may be committed by setting fire to one's own property. The presumption here, also, is against the defendant; but, upon its rebutter, positive proof must be given, as in the two preceding cases, which proof arises from the precedent and contemporary circumstances.

4. *Malicious Mischief.*—"In its general application, it may be defined to be any malicious or mischievous injury, either to the rights of another, or to those of the public in general." Whart. Am. Cr. Law, 433, 1st ed. Malice, either express or implied, against the owner, and not against the thing injured, is requisite to the maintenance of the action. *State* vs. *Wilcox*, 3 Yerg. 278.

5. *Libel.*—"A libel is a censorious or ridiculous writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates or individuals." Hamilton *arguendo*, *People* vs. *Crosswell*, 3 Johns. Cas. 354.

In order to constitute this an indictable offence, it must be shown to have been written or published with malice. 3 Chitty's Cr. Law, 867. The malice results as a necessary implication upon proof of the libel. It may be rebutted by the defendant in two ways: 1st. By showing that the publication was made by an agent, without his knowledge or authority; 2d. By showing the truth of the charge, and that the publication was made with good motives and for justifiable ends. At common law the truth was no defence.

II. *Civil Actions.*—Some actions may, at the same time, be prosecuted criminally on behalf of the public for the penalty, and civilly by the individual for damages. The general procedure is for the courts, upon granting the indictment, to require the indi-

vidual to forego his civil action; or, if this is not done, for the jury to modify their verdict by reference to the action to which the defendant is still liable. Only one of these will need additional consideration.

1. *Malicious Prosecution.*—Two things are necessary to sustain an action of this sort, to wit: want of probable cause for the prosecution by the defendant; and maliciousness in the prosecution. *Ewing* vs. *Sandford*, 21 Ala. 162. Some of the authorities are more liberal, but as the doctrine has been recognized in the federal courts, it may be regarded as well settled. Justice Story says, in *Wiggins* vs. *Coffin*, *ut supra:* "In respect to the other point, whether the prosecution was malicious, as well as without probable cause, (for both must concur to support the action), malice may be justly deduced from the total want of probable cause; for, in the sense of the law, that is a malicious act which is done wilfully by a party against his own sense of duty and right."

2. *Libel.*—This has previously been defined. To it the doctrine of malice is applicable in all its fullness and under all its various phases. Ordinarily, proof of the writing and publication draws in its train the presumption of malice. A justification attempted, but not most precisely proved, is, at common law, conclusive evidence of malice. *Root* vs. *King*, 7 Cowen, 624. This rule is modified in the State of New York, by the construction given to § 185 of the code of procedure by the Court of Appeals, in *Bush* vs. *Prosser*, 1 Kern. 347. Proof of the falsity of the charge involves malice.

But there is a class of cases in which it must be specifically proved. These may be denominated, in general terms, cases of privilege. Such are the character given to a servant; remarks made in a legislative assembly, in the course of judicial proceedings, or in church discipline; and others of the like nature. Where, as in these cases, an evil motive is an essential, substantive part of the offence, it is to be determined by "a consideration, in every particular case, of all such circumstances as may, in right season—in the judgment of plain, unsophisticated common sense—be thought to make either for or against the fact of an evil motive having led

to the publication." (George on Libel, 340–41.) And proof of special damage, in ordinary cases, relieves entirely from the necessity of showing malice.

This is, perhaps, all that need be said of particular actions. Into many others malice enters as an aggravating circumstance, though not essential to their maintenance. It is an undeniable general principle that an act legal in itself, and which violates no right, cannot be made actionable on account of the motive by which it is prompted. *Chatfield* vs. *Wilson*, 28 Vt. 49. As has already been remarked, there is an increasing tendency in modern adjudication to dissociate legal proceedings from any consideration of mental conditions. The old terms and phrases will, doubtless, be retained; yet, like many others in language at large, they will be formal and meaningless. This tendency is in harmony with the healthy progressiveness of the age. The allowance to any man or set of men of the right to judge by what internal purpose, action is in a given case, controlled, places in their hands a dangerous engine of power, which can only be restrained by inflexible rules of evidence. The doctrine was originally unnecessary; with a few exceptions, it belongs to the past.

G. S. L. S.

RECENT AMERICAN DECISIONS.

In the United States Court—South Carolina District—In Admiralty.

JAMES MARSH & SON *vs.* THE BRIG MINNIE.

JOHN COMMINS *vs.* THE BRIG MINNIE.

BEE & TYLEE *vs.* THE BRIG MINNIE.

HENRY SMYZER *vs.* THE BRIG MINNIE.

1. By the maritime law there is no lien for supplies in the home port. The credit is supposed to be given to the owner, and not the ship.

2. J. C. owned the brig M. and sold to T., who secured the purchase money by a mortgage duly executed and recorded. Subsequent to the sale and excution of the mortgage, J. M. & Son repaired the brig and kept her in their custody until the